APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,

vs.

CHESTER DEAN KISER,
Defendant in Error.

SYLLABUS

1. In an action of legal cognizance, where there is any competent evidence presented by the plaintiff reasonably tending to establish plaintiff's cause of action alleged in his petition, defendant's demurrer to the evidence and motion for directed verdict should be overruled.

APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY, STATE OF OKLAHOMA

Honorable Ralph B. Hodges, Judge

Action for damages. From verdict and judgment for plaintiff, defendant appeals.

AFFIRMED

PER CURIAM:

This cause arose from a collision between a railroad train operated by the Missouri-Kansas-Texas Railroad Company and a road roller being used on highway construction operated by Chester Dean Kiser. The parties

will be referred to by their trial court designation. The plaintiff, Chester Dean Kiser, offered evidence to support his cause of action, the defendant, Missouri-Kansas-Texas Railroad Company, demurred to the evidence of the plaintiff, which demurrer was overruled and the defendant elected to stand on the demurrer. The cause comes here on appeal by the defendant from the order overruling the motion for new trial, which was based on the trial court overruling the demurrer to the evidence.

The evidence of the plaintiff reflected him to be employed by the McKnight Construction Company in the construction of Highway #75-A, the duties being pursued at the time of the accident consisting of the pulling of a road roller or packer on the newly constructed roadway; and at the time of the accident such work was being performed back and forth across the railroad crossing at which the alleged accident occurred. The course of conduct being followed by the plaintiff was driving over the crossing in one direction, making a turn and driving the packer in the opposite direction over the crossing and continuing this course of conduct until the accident occurred. There appeared to be no operating defects in the vehicle being operated by the plaintiff.

A witness, Thomas Morris Hamilton, highway patrolman, testified of the circumstances found at the scene of the accident and related that the measured distance from the railroad crossing and the point of impact to the point ascertained as the position in which the engineer stopped, as being seven hundred sixty-nine feet (769′), and that portions of the packer were knocked ninety-nine feet to two hundred fifty feet (99′ to 250′) away from the point of impact.

The medical testimony is not reviewed nor considered at this point since the question of injury and quantity of damages does not appear to be urged in the brief of the defendant.

Arlan Edward Whittington testified for the plaintiff that he was driving a truck, waiting at a set of weighing scales along the side of the railroad track; that he had seen the train shortly before pulling up to the scales; that he heard no signal, whistle or anything until just before the impact with the plaintiff. He further testified that if the train was whistling or had whistled before the point of impact, he did not hear it; however, that he had no trouble hearing the train whistle just before the point of impact. He did not actually see the impact. On cross-examination, the witness testified that he became aware of the approach of a train about the time that he stopped his truck; that he did not know whether his windows were up or down, and that although he saw the train coming, he was not paying particular attention because he was not anticipating crossing the tracks. He further testified on cross-examination that he would not say the train had not whistled before the time he heard it; but simply that if it whistled, he did not hear it.

The witness Glenda Castle testified for the plaintiff that she was sixteen (16) years old, familiar with the crossing involved in the accident; that she and some of her friends were walking about one-third (⅓) of a block away from the railroad track and apparently were walking toward the railroad crossing; that she heard the train whistle, looked up and the impact occurred. She testified this was the first time she heard the train whistle. On cross-examination she testified she was not looking for the train, that it might have whistled before, but if so, she did not hear it.

The witness Carolyn Taylor, seventeen (17) years old, testified that she was walking with the witness Glenda Castle toward the railroad crossing, heard the train whistle blow, looked up, a comment of danger was made, and the impact occurred. She stated she had not been paying any attention to the train or anything before that time, and that her attention was attracted by the train whistle.

The witness Nath Work testified that the crossing was a clear crossing, that he drove up to the set of scales south of the road and west of the railroad track and stopped; that at the time he stopped he heard a train whistle and the collision happened as he looked up; that he had no trouble hearing the train whistle at the time. On cross-examination, he testified that his left window was down but the right window was closed in his vehicle; that he was interested and thinking about getting his truck weighed and going back for additional gravel; that he was not watching for the train, was not listening for a whistle to blow, and that he did not know whether or not the train had whistled before he stopped his truck.

At the close of plaintiff's evidence and the overruling of defendant's demurrer, the defendant elected to stand on the demurrer, offered no evidence and the court instructed the jury, which thereafter returned a verdict for the plaintiff.

It is the contention of the defendant that the evidence of the plaintiff in regard to the duty and violation thereof, of the defendant to blow a whistle or sound a bell eighty rods (80 rds.) prior to the railroad crossing, is not supported by probative evidence, but that all of the evidence introduced was negative evidence without probative value, and that the demurrer to the evidence should have thus been sustained.

The contention of the defendant does not give to the plaintiff's evidence and all inferences properly taken therefrom, the probative force to which such evidence is entitled. Four witnesses testified that they heard the whistle immediately before impact; that they did not hear a whistle before that time. There was sufficient competent evidence for the jury to find that the train made no sound or signal sufficient to draw their attention to its presence prior to the whistle immediately before impact. It is to be noted that the verdict of the jury is such that the ability to know and observe the happening of the event

in question, viz, the blowing of a whistle eighty rods (80 rds.) from the railroad crossing, was determined in favor of the plaintiff. The probative value of the evidence was apparently weighed by the jury. The proximity of the witnesses to the scene, the physical ability to hear of the witnesses, and their attention or inattention to the warning whistle or other signal were all determined, under proper instructions, in favor of the plaintiff. When a witness was in a position to make observation as to whether a certain fact existed or a certain thing happened, and he testified that he did not know of the existence of the fact or did not observe that the thing happened, his testimony is not negative, but has probative force and must be submitted to the jury.

This court has previously held in Ft. Smith & W.R. Co. v. Moore, 66 Okl. 322, 169 P. 904, under a set of facts in which a number of bystanders swore that neither the bell rang nor the whistle sounded until the danger of the plaintiff actually appeared, that such testimony was not purely negative; but, whether positive or negative, it was within the province of the jury to determine the facts after considering all of the evidence in light of the surrounding circumstances. We said in this case, page 908,

> "If persons are in hearing distance of an alleged sound, and it does not appear that their hearing is impaired, their testimony as to whether or not a sound was made should be considered by the jury. If, when the engineer on a railway train testified that he sounded the bell or whistle for a crossing, his testimony could not legally be disputed by other witnesses testifying that they were close enough to hear and that the bell was not rung or the whistle blown, in many cases there would be no way of establishing this character of negligence."

The applicable factual circumstances are that the witnesses in the cited case testified they did not hear the whistle prior to the danger, but that they did hear the

whistle when the danger to the plaintiff actually appeared and this is a determinative factor in the instant case.

In the case of St. Louis-San Francisco Ry. Co. v. Rundell, 108 Okl. 132, 235 P. 491, this court accepted the proposition that the testimony of one who was physically able to hear in such proximity as to permit hearing and whose attention was not so diverted from the circumstances as to have prevented the hearing of a whistle, was a positive statement of fact, though negative in form.

In St. Louis-S.F. Ry. Co. v. Russell, 130 Okl. 237, 266 P. 763, this court followed the proposition set forth in the Rundell case, supra, and applied this proposition of law to the testimony of two witnesses, the first who was one hundred fifty feet (150′) from the railroad crossing involved, and the second who testified that although he heard the short blast given by the train just before the impact, he did not hear any other whistle and bell between the highway and the Santa Fe crossing; and his further testimony was that the train could have whistled shortly after crossing the Santa Fe tracks and escaped his hearing. In the cited case, it was held that such evidence was sufficient for the submission of the cause to the jury and such evidence, though negative in form, was positive as to character. See also St. Louis-San Francisco Ry. Co. v. Robinson, 99 Okl. 2, 225 P. 986; Kugler v. White, 91 Okl. 130, 216 P. 903; Sand Springs Ry. Co. v. McWilliams, 170 Okl. 85, 38 P.2d 539. It is more than noteworthy in the instant case that all of the witnesses who testified for the plaintiff stated that the whistle of the train, immediately before the impact with the plaintiff, was clearly audible, and this fact alone is sufficient proof that all the witnesses were in a position to hear a train whistle, possessed an ability to hear the train whistle and were giving such attention to the railroad as to satisfy the requirements of all of the cited cases. From the fact that the witnesses did hear the train whistle immediately before the impact the jury may properly infer that the witnesses were in the position to

hear, possessed the ability to hear, and were giving such attention to the train and crossing that had the train whistled or indicated its presence by other signal eighty rods (80 rds.) before the crossing in question, the witnesses would each have heard the whistle, or other signal.

Defendant further contends that there is an entire absence of evidence relating to the ringing of a bell. The testimony of the four witnesses that their attention was first drawn to the train by the whistle immediately before impact and the finding of the jury that the statutory signals, blowing whistles and ringing bells, were not complied with by the defendant, necessarily includes a reasonable inference or conclusion that there was no signal, including the ringing of a bell of at least thirty pounds weight, prior to the blast of the whistle which everybody heard. In support of this contention, defendant cites Missouri, Kansas & Texas RR. Co. v. Flowers, 187 Okl. 158, 101 P.2d 816. In the Flowers case, supra, the court held that the evidence of the driver that he heard neither bell nor whistle before driving his truck into the train did not constitute sufficient evidence, standing alone, under all the circumstances presented therein, that no warning was given. We held in Wilson v. C.R.I.&P. RR. Co., et al., Okl., 429 P.2d 763, that the testimony of a witness, standing alone, who was located about a quarter of a mile from the railroad track working near two motors, that he did not hear a whistle was insufficient evidence to prove the train did not whistle. These cases are distinguishable on their facts to the instant case in which four witnesses in a position near the crossing testified to not hearing a signal. It appears reasonable that, had any signal been given prior to the point of impact, such signals would have been noticed.

There being no other error urged in this appeal, the judgment of the trial court is affirmed.

The court acknowledges the services of Frank M. Ogden, who with the aid and counsel of Robert H. Loofbour-

row and Don Dale, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the court. The Chief Justice then assigned the case to McInerney, J. for review and study, after which and upon consideration by the court, the foregoing opinion was adopted.

Jackson, C.J., Irwin, V.C.J., and Davison, Williams, Blackbird, Berry, Lavender and McInerney, J.J., concur.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Filed In Supreme Court of Oklahoma, Nov. 7, 1967,
ANDY PAYNE, Clerk

THE CLERK IS HEREBY DIRECTED TO ISSUE THE FOLLOWING ORDERS:

40808—Missouri-Kansas, Texas RR. Company v. Chester Dean Kiser. Petition for Rehearing denied and Application for Oral Argument Denied.

FLOYD L. JACKSON,
Chief Justice.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,

versus

CHESTER DEAN KISER,
Defendant in Error.

Application for Leave to File Second Petition for Rehearing; Motion for Extension of Time Within Which to File Same; and Motion for Permission to File Typewritten Brief with Duplicator-Printed Copies

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SECOND PETITION FOR REHEARING

BRIEF IN SUPPORT OF
SECOND PETITION FOR REHEARING

Leave is hereby granted to file this 21 day of November, 1967.

FLOYD L. JACKSON,
Chief Justice

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APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING; MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE SAME; AND MOTION FOR PERMISSION TO FILE TYPEWRITTEN BRIEF WITH DUPLICATOR-PRINTED COPIES

Comes now the plaintiff in error, the Missouri-Kansas-Texas Railroad Company, a corporation, and respectfully shows the Court that heretofore, to-wit, on the 12th day of September, 1967, a judgment and decision of this Court was rendered, affirming the judgment of the District Court of Bryan County, State of Oklahoma, in favor of the defendant in error and against plaintiff in error; and

That thereafter, on the 11th day of October, 1967, plaintiff in error filed in said case its petition for rehearing, which said petition was by this Court overruled on the 7th day of November, 1967.

That the opinion of this Court is in conflict with the controlling statute and decisions, as more fully appears in the attached second petition for rehearing.

That although the decision of the Court was made on the 7th day of November, 1967, the undersigned counsel of record for the plaintiff in error was not advised of the Court's decision and had no actual notice of the action of the Court until this date.

WHEREFORE, plaintiff in error prays for leave to file this, its second petition for rehearing, a copy of which petition is hereto attached, together with brief in support thereof, out of time; and further moves that the Court

grant it permission to file a typewritten brief with duplicator-printed copies.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

SECOND PETITION FOR REHEARING

Comes now the Missouri-Kansas-Texas Railroad Company, a corporation, plaintiff in error, and respectfully moves the Court to withdraw, vacate and set aside the decision filed herein and to grant it a rehearing for the following reasons:

1. The Court, in its opinion, erred in holding that the trial court was correct in overruling the demurrer to the evidence and motion for directed verdict of plaintiff in error and submitting the case to the jury.

2. The Court, in its opinion, erred in holding that there was sufficient competent evidence presented by the defendant in error reasonably tending to establish defendant in error's cause of action alleged in his petition.

3. That the decision is in conflict with Section 126 of Title 66 of Oklahoma Statutes, 1961.

4. That the said decision is in conflict with the cases interpreting Title 66 of Oklahoma Statutes, 1961, Section 126.

WHEREFORE, plaintiff in error prays that the Court consider this second petition for rehearing, and the brief filed in support thereof; that the opinion heretofore filed herein on September 12, 1967 be vacated and withdrawn; and an order entered dismissing defendant in error's action or, in the alternative, that the cause be remanded to the lower court with instructions to sustain plaintiff in error's demurrer to the evidence.

Plaintiff in error further prays that, pending resubmission of this case, it be granted an oral hearing.

Respectfully submitted,

A. JAMES GORDON
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P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
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735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

BRIEF IN SUPPORT OF SECOND PETITION FOR REHEARING

STATEMENT

We hereby adopt and reassert the matter contained in our printed brief filed with our original petition for rehearing, and rely on the authorities and arguments made therein.

We wish to call to the Court's attention that Section 126 of Title 66 of Oklahoma Statutes Annotated provides as follows:

> "A bell of at least thirty pounds weight, *or* a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the State, and shall also be liable for all damages which shall be sustained by any person by reason of such neglect." (Emphasis ours.)

It is well settled case law that a railroad company need not both sound a whistle *and* ring a bell in order to comply with Section 126 of the statute. See *Missouri, K. & T. Ry. Co.* v. *Raines* (Okla.), 158 Pac. 936. See also, *Missouri, O. & G. Ry. Co.* v. *Parker* (Okla.), 151 Pac. 325.

In the opinion of the Court filed in this case, the Court stated as follows:

> "The testimony of the four witnesses that their attention was first drawn to the train by the whistle immediately before impact and the finding of the jury that the statutory *signals*, blowing whistles *and* ringing bells, were not complied with by the defendant, necessarily includes a reasonable inference or conclusion that there was no signal, including the ringing of a bell of at least thirty pounds weight, prior to

the blast of the whistle which everybody heard." (Emphasis ours.)

This decision, if allowed to stand, will rewrite Section 126 of the statute that requires only that a bell *or* whistle be sounded and will, of course, reverse all the decisions that have heretofore held that the sounding of both the bell and the whistle were not necessary to comply with the statute.

If the Court, in its decision, meant to rewrite the statute and change the case law, then the decision should be allowed to stand as written. However, if this was not the intent of the Court, then this decision must be withdrawn.

We respectfully reurge that we be allowed to present oral argument to the Court in this cause.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Leave to File Second Petition for Rehearing; Motion for Extension of Time Within Which to File Same; and Motion for Permission to File Typewritten Brief with Duplicator-Printed Copies; Second Petition for Rehearing; and Brief in Support of Second Petition for Rehearing was mailed to Alan B. McPheron, Durant, Oklahoma and to Jake Hunt, 765 First National Building, Oklahoma City, Oklahoma, attorneys of record for defendant in error, this 21st day of November, 1967.

/s/ William J. Ross

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
A Corporation,
Plaintiff in Error,
versus
CHESTER DEAN KISER,
Defendant in Error.

AMENDMENT TO SECOND PETITION FOR REHEARING

Come now the Missouri-Kansas-Texas Railroad Company, a corporation, plaintiff in error, and respectfully moves the Court to allow it to amend its Second Petition for Rehearing, on file herein, by adding the following, to-wit:

5. That the said decision is in conflict with the Constitution of the United States of America, and the amendments thereto, and specifically the Fourteenth Amendment, in that:

(a) The said decision denies the plaintiff in error equal protection of the laws; and

Leave is hereby granted to file this 22 day of November, 1967.

FLOYD L. JACKSON,
Chief Justice

(b) That the said decision denies the plaintiff in error due process of law.

Respectfully submitted,

A. JAMES GORDON
LEON G. BELOTE
P. O. Box 58
McAlester, Oklahoma

and

RAINEY, FLYNN, WELCH,
WALLACE, ROSS & COOPER
735 First National Building
Oklahoma City, Oklahoma

By /s/ William J. Ross
Attorneys for Plaintiff in Error

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Amendment to Second Petition for Rehearing was mailed this 22nd day of November, 1967, to Alan B. McPheron, Durant, Oklahoma and to Jake Hunt, 765 First National Building, Oklahoma City, Oklahoma, attorneys of record for defendant in error.

/s/ William J. Ross

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 40,808

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
a Corporation,
Plaintiff in Error,

vs.

CHESTER DEAN KISER,
Defendant in Error.

Filed In Supreme Court of Oklahoma, Jan. 26, 1968
ANDY PAYNE, Clerk

ORDER

Upon written application of Plaintiff in Error it is ordered that our order of January 16, 1968, denying Plaintiff in Error's Application to File Second Petition for Rehearing & Motion for Oral Argument be amended to read as follows:

> "Second Petition for Rehearing and Amendment thereto and Motion for Oral Argument Considered and Denied."

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE ON THIS 26TH DAY OF JANUARY, 1968.

/s/ Floyd L. Jackson
Chief Justice